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Effects of armed conflicts on treaties

Comments and information received from Governments

I. Introduction

1. At its sixtieth session (2008), the International Law Commission adopted, on first reading, the draft articles on the effects of armed conflicts on treaties.[1] In paragraph 63 of its report, the Commission decided, in accordance with articles 16 to 21 of its Statute, to request the Secretary-General to transmit the draft articles to Governments for comments and observations, requesting also that such comments and observations be submitted to the Secretary-General by 1 January 2010. The Secretary-General circulated a note dated 2 December 2008 transmitting the draft articles to Governments, as well as a reminder note dated 15 September 2009. In paragraph 5 of its resolution 63/123, the General Assembly drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft articles.

2. As at 10 March 2010, written replies had been received from Burundi (7 April 2009), China (30 December 2009), Colombia (9 February 2010), Cuba (29 January 2010), Ghana (4 January 2010), Lebanon (6 July 2009), Poland (31 December 2009), Portugal (6 January 2010), Slovakia (31 December 2009), Switzerland (14 January 2010) and the United States of America (1 February 2010). The comments and observations received from those Governments are reproduced in section II, organized thematically, starting with general comments and continuing with comments on specific draft articles.

[1] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 65.

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II. Comments and information received from Governments

A. General comments

Burundi

[Original: French]

1. From the legal standpoint, present-day conflicts have become unstructured conflicts that no longer always conform to the normal and classic rules of armed conflict that were always observed in the practice of war. This new kind of armed conflict involves a number of poorly identified actors, such as militias, members of armed factions who are generally recruited informally and who have no notion of respect for human rights, civilians who themselves become actors in the conflict, ad hoc soldiers, and even mercenaries recruited for a specific situation; and is a situation in which each armed group now makes its laws, to the detriment of the rules that are recognized and embodied in international law. There is reason to wonder whether international texts remain effective and relevant in the light of the change in the nature of conflicts.

2. Despite such difficulties, the Vienna Convention on the Law of Treaties of 1969 remains appropriate in relation to the effects of armed conflicts on treaties. The inclusion of internal conflicts in the scope of the draft articles should be examined in the context of the Vienna Convention. The issue of effects of armed conflicts on treaties forms part of treaty law and must be kept distinct from the law on the use of force.

China

[Original: Chinese]

The draft articles should strike an appropriate balance between maintaining the continuity and stability of treaty relations and the effect that dealing with armed conflicts has on those relations. The draft articles should be used only to supplement the Vienna Convention on the Law of Treaties and not to change the content of that Convention.

Ghana

[Original: English]

1. A historical perspective on the desirability of paying attention to a study of the effects of armed conflicts on treaties would suggest that a contemporary study of this subject based on more contemporary practice is worthwhile, considering the number of armed or violent conflicts witnessed in all corners of the world in the post-cold-war era. While it has yet to be established that the many conflicts the world has witnessed have had a dramatic impact on the law of treaties, it seems useful, nonetheless, to address this topic, if only to anticipate, define and refine the rules on the possible effects of exceptional situations of armed conflicts on treaties, focusing on all conceivable aspects, and not just on suspension or termination of treaties by States or on depositary functions.

2. In the light of recent resolutions adopted by the Security Council and the General Assembly aimed at enhancing the protection of civilians in armed conflict,

the Commission may also look at this dimension with appropriate "without prejudice" clauses, in respect of international humanitarian and human rights law, and also the relevant provisions of the Charter of the United Nations concerning the powers of the Security Council. Ghana subscribes to the Martens Clause, enunciated about a century ago, which postulates that populations and belligerents remain under the protection of the "principles of international law ... the laws of humanity and the requirements of the public conscience".

3. Ghana shares a stated policy underlying the study of this topic, which is to ensure security, stability and predictability in treaty relations in order to minimize the negative effects of armed conflicts on treaty obligations. It should also be the aim of the study to ensure a proper balance between strong and weak nations in respect for the rule of law, and to strengthen the Charter of the United Nations in order to facilitate the attainment of some key purposes and objectives of the United Nations, namely development, peace and security, and respect for human rights.

Lebanon

[Original: English]

Lebanon agrees to the draft articles on the effects of armed conflicts on treaties, adopted by the International Law Commission at its sixtieth session.

Poland

[Original: English]

1. The task with which the Commission has been entrusted should be re-evaluated. It may well be that the efforts of the Commission have proved that the topic "the effects of armed conflicts on treaties" is, after all, not yet ready for codification and progressive development. There is not only a scarcity of information on the contemporary practice of States, but also a profound change in the realm of armed conflicts (as most present-day armed conflicts are not international), making the project even more elusive. Thus, it may well be that the only solution is to put the work on the back burner.

2. In the meantime, the Commission may consider drafting a questionnaire containing a list of well-thought-out and precise questions for States on the project. The questionnaire should be drafted with the view to finding out whether comprehensive and viable regulation of the subject matter is achievable at the present time.

Portugal

[Original: English]

1. The point of the topic is to know to what extent the reciprocal confidence between parties regarding the fulfilment of the obligations set out in the treaty would be jeopardized in case of an armed conflict. Thus, the key and only *ratio* of this subject is how to strike the balance between the confidence of the parties, as a prerequisite for compliance with treaties, and the need for legal certainty.

2. While satisfied to see progress being made on the topic, Portugal is of the opinion that there are some important matters that still need to be settled in order to move towards a more mature work.

Switzerland

[Original: French]

The present draft articles are of interest to Switzerland not only as a State party to the Geneva Conventions and their Additional Protocols, but also as their depositary. The long-standing position of the international community, generally, to consider armed conflict not as something apart from the law, but as a situation to be ruled by law, was overwhelmingly confirmed by the adoption of the Geneva Conventions in 1949. The preparation of the draft articles is the continuation of that principle.

United States of America

[Original: English]

The United States has consistently supported the general approach taken in the draft articles, which preserves the reasonable continuity of treaty obligations during armed conflict and identifies several factors relevant to determining whether a treaty should remain in effect in the event of an armed conflict. Nonetheless, the United States continues to believe that the draft articles require further work and consideration.

B. Specific comments on the draft articles

1. Draft article 1
Scope

Burundi

[Original: French]

It would be desirable to examine the effects on bilateral treaties and on multilateral treaties and to make the distinction between belligerent States and third States in armed conflicts. For treaties concluded provisionally, the scope must be understood to cover the treaties envisaged in article 25 of the Vienna Convention on the Law of Treaties.

China

[Original: Chinese]

Having taken note of paragraph (4) of the commentary on this article, China understands the Commission's reasons for limiting the scope of the draft article to treaties between States. At the same time, China is of the view that, with the steadily growing participation of international organizations in international activities, the variety of treaties they are concluding with States is also becoming richer, and such treaties are unavoidably affected by armed conflict (for example, host country agreements involving international organizations and States could give rise to such problems). For this reason, China recommends that, on the second reading, the Commission further consider whether or not to include the effects of armed conflict on treaties involving international organizations.

Colombia

[Original: Spanish]

While the provisional application of treaties may be included, Colombia, when ratifying the Vienna Convention on the Law of Treaties, entered a reservation not recognizing the provisional application of treaties.

Ghana

[Original: English]

The study of this topic may go beyond a narrow focus on the effects of armed conflicts on treaties in the sense or meaning of the Vienna Convention on the Law of Treaties, relating to treaties between States *stricto sensu*, to include agreements between States and international organizations. The provisions of the African Union Constitutive Act and recent developments during the sixty-fourth session of the General Assembly argue in favour of the importance of a closer study of this topic by the International Law Commission.

Poland

[Original: English]

Poland proposes that draft article 1 read "[t]he present draft articles apply to effects of armed conflicts between States in respect of treaties", so that the scope of the draft articles is clearly limited to international armed conflicts between States. The draft articles have their origin in article 73 of the Vienna Convention on the Law of Treaties, which refers to the outbreak of hostilities "between States". The commentary to draft article 1 erroneously suggests that the descriptor "between States" refers to treaties, whereas it obviously refers to hostilities. (See also the comments on draft article 2 below.)

Portugal

[Original: English]

1. To enlarge the scope of the topic to situations in which only one party to a treaty participates in an armed conflict and to situations of internal conflict is not the best approach. Those situations are already adequately addressed in the provisions of the Vienna Convention on the Law of Treaties regarding "supervening impossibility of performance" (article 61) and *rebus sic stantibus* (article 62), which cover situations where only one State foresees difficulties complying with a treaty. In an ongoing conflict between parties to a treaty, the issue at stake is the level of trust and confidence necessary for the regular execution of the treaty.

2. The question of the inclusion of treaties concluded by international organizations raises both practical and theoretical issues that are too difficult to be dealt with in the framework of this topic and should be excluded from the scope of the topic.

3. As to the position of third States with regard to the armed conflict, Portugal fully supports the assessment that, as a matter of treaty law, an armed conflict would produce only the consequences generally provided for in the Vienna Convention on the Law of Treaties, for a State not involved in that conflict. Therefore, it has doubts

as to the recommendation of the Working Group on the Effects of Armed Conflicts on Treaties that the draft articles should apply to *all* treaties between States where at least one of the States is a party to an armed conflict.

2. Draft article 2
Use of terms

Burundi

[Original: French]

It must be acknowledged that it is difficult to distinguish between international and non-international armed conflicts. Present-day armed conflicts have blurred such distinctions and the number of "civil wars" has increased. Many of these civil wars include "external elements", such as varying degrees of support and participation of other States. Non-international armed conflicts can affect the operation of treaties as much as, if not more than, international armed conflicts and for that reason the proposed draft articles should also deal with the effects of such armed conflicts on treaties. There is a need to determine the legal effects on a treaty in situations involving non-State actors, such as militias, members of armed factions, civilians who themselves have become actors in a conflict, ad hoc soldiers or mercenaries recruited for a specific situation.

China

[Original: Chinese]

China is of the view that the responsibilities towards other States borne by a State within which an armed conflict is ongoing and by a State caught up in an international armed conflict are not exactly alike. In principle, a State does not have the right to claim exemption from its international obligations by reason of an ongoing internal armed conflict, unless that internal armed conflict has deprived that State of the ability to fulfil its treaty obligations. In other words, invoking internal armed conflict does not have the same force as invoking international armed conflict as a reason for a State to terminate or suspend a treaty. Accordingly, China recommends that the Commission further study the issue.

Colombia

[Original: Spanish]

1. The definition of armed conflict refers to situations that may affect the application of treaties. In other words, an effect or consequence of the conflict is part of the definition, which may cause confusion. The international law of armed conflict does not expressly define "armed conflict"; it allows, however, for the identification of the characteristics of armed conflict and for a distinction between domestic and international armed conflicts. It may be inferred from the scope of the Geneva Conventions of 1949 that "international armed conflict" implies a declared war or any other armed conflict between two or more States, consistent with the definition proposed in paragraph (b), whether or not it is recognized by any of the parties.

2. It would suffice to include these characteristics in the definition contained in the article without mentioning any of the causes. It must be borne in mind that both

the International Court of Justice at The Hague and the Nuremberg and Tokyo Tribunals have established that the law on armed conflict as a whole is part of *jus cogens* — customary international law — and is therefore binding on all members of the civilized international community, even on States that are not signatories to the various Geneva and Hague instruments.

Cuba

[Original: Spanish]

Cuba considers that the term "embargo" should be included within the definition of "armed conflict", even if there are no armed operations between the parties. The article should also make reference to non-international as well as international conflicts, bearing in mind that both types of conflict can affect the execution of and compliance with treaties.

Ghana

[Original: English]

1. The scope of the study of this topic should cover internal and international conflicts. Article 3 of the protocol of the Economic Community of West African States (ECOWAS) relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, to which Ghana is a State party, stipulates that one of the objectives of the mechanism is to "prevent, manage and resolve internal and inter-State conflicts", thus making no distinction between international and non-international conflicts. In this context, the question of the extent to which an armed conflict affects the nature of the treaty obligations of a fragile or failed State whether or not a country's status as a failed or fragile State was the consequence of either an internal conflict or an international conflict, merits further study. Ghana's experience has been not to retaliate, but to encourage compliance by a conflict-torn neighbouring country that unilaterally decided to waive certain aspects of the provisions of an ECOWAS treaty on free movement of persons, citing financial difficulties and the need to raise revenue to facilitate its recovery.

2. Furthermore, like other agreements of a similar nature, the aforementioned ECOWAS treaty (protocol), which essentially becomes operable in the event of a conflict, would suggest that the Commission may wish to examine and elaborate any specific rules applicable to such categories of treaties in the course of its work.

3. An attempt by the Commission to consider further clarification of the definition of armed conflict will add value to an examination of the legal effects of armed conflicts on treaties. In an apparent attempt to address the problem of definition, the ECOWAS Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security uses the term "Member State in crisis", which "refers both to a Member State experiencing an armed conflict as well as a Member State facing serious and persisting problems or situations of extreme tension which, if left unchecked, could lead to serious humanitarian disaster or threaten peace and security in the sub-region or in any Member State affected by the overthrow or attempted overthrow of a democratically elected government". The question of whether or not a formal declaration of war exists and the duration of the conflict may be taken into account by the Commission in further elucidating the draft articles on the effects of armed conflicts on treaties.

Poland

[Original: English]

1. The definition of the term "armed conflict" should make clear that it refers exclusively to international armed conflicts by adding the word "international" before "conflict". Expanding the scope of the draft articles to cover internal armed conflicts is incompatible with the Vienna Convention on the Law of Treaties, which already applies to internal armed conflicts: the State on whose territory the upheaval occurs may take advantage of a whole range of measures, provided for in the Convention, and attempt termination, withdrawal from or suspension of the operation of a treaty. The inclusion of internal armed conflicts in the draft articles would undermine such procedural safeguards adopted in the Convention. (See also the comments on draft article 1 above.)

2. Poland further suggests that there is a need to expand article 2 to cover other terms used in the present draft articles. The document should follow the pattern of the Vienna Conventions of 1978 and 1986. For example, the term "party" is not defined and is used to denote both a State party to the treaty and a State party to the conflict. As a result, the term "third State", meaning not a party, is ambiguous as it could denote either a third State with regard to the treaty (not a party to a treaty), or a third State with regard to the armed conflict (not a party to the conflict). The terms "State party" and "third State" have established meanings. Thus, using the terms with reference to the armed conflict may cause confusion. Some other terms should be used instead, for example: "a State or States in the conflict" or "a hostile State or States" to describe the State involved in an armed conflict, and "a State or States not involved in the conflict" to describe the State now appearing under the designation of a third State outside the conflict, but still a party to the treaty under consideration.

Portugal

[Original: English]

Portugal has doubts regarding the inclusion of internal conflicts. An internal conflict, by definition, does not involve more than one State party to a treaty and does not directly affect relations between that State and the other States parties, and accordingly would only activate the provisions of the Vienna Convention on the Law of Treaties concerning suspension or termination of treaties.

Slovakia

[Original: English]

The term "armed conflict" should include both international armed conflicts and non-international armed conflicts. The use of the term is consistent with common article 2 of the Geneva Conventions of 1949 and also with article 1 of Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts) and Protocol II (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts).

Switzerland

[Original: French]

1. The inclusion of internal armed conflicts must be supported. The experience of past decades has shown that internal armed conflicts can affect a State's ability to fulfil its contractual obligations, at least to the same degree as international armed conflicts. The study by the Secretariat confirmed that view, citing several specific examples from State practice.[2] In addition, many States have expressed that view in the Sixth Committee, as have some members of the International Law Commission.

2. The objections of those States opposed to the inclusion of internal armed conflict in "armed conflict" may be dispelled by the fact that only armed conflicts "which by their nature or extent are likely to affect the application of treaties" (draft article 2 (b)) are relevant. In accordance with that provision, the definition of armed conflict should cover internal armed conflicts, on the understanding that States must only be able to invoke the existence of an internal armed conflict to suspend or terminate a treaty when the conflict in question is of a certain intensity.

3. Moreover, it is important not to set forth, in the draft articles, a narrower definition of armed conflict, excluding internal armed conflict, than the one established in other international legal instruments. It is clearly dangerous to suggest that the concept of "armed conflict", established in the context of international humanitarian law, should be understood differently in the context of treaty law. That poses the risk of confusion if a subsequent document refers to or uses the term "armed conflict". Switzerland therefore welcomes the commentary on draft article 2 (b), which notes that internal armed conflicts are included in the expression "armed conflict", in line with practice in public international law in general.

4. Similarly, the expression "armed operations" could suggest a reference to regular inter-State conflicts, given that the word "operation" is normally used in the context of traditional military strategy and, therefore, in a context of inter-State conflict. Draft article 2 should perhaps be reformulated to avoid that interpretation.

5. The term "state of war" is also open to challenge. As this concept is used in traditional public international law, a state of war exists between States once a formal declaration of war has been made, regardless of actual armed actions. In modern public international law, the concept is clearly outmoded. The use of such an expression is inappropriate in the context of the effects of armed conflicts on treaties.

6. Switzerland believes that "armed conflict" already includes occupations, and so it is not necessary to use "state of war" to cover such cases. It therefore suggests deleting the words "state of war". In the commentary, explicit note could be made of the inclusion of occupations of territory, so as to avoid any misunderstanding.

United States of America

[Original: English]

1. The United States reiterates its serious doubts regarding the appropriateness of including a definition of "armed conflict" in draft article 2. It is worth noting that

[2] A/CN.4/550 and Corrs.1 and 2, para. 147 ff.

even treaties directly relating to armed conflict, such as the Geneva Conventions, do not define this term. There is a wide variety of views on this question and such a definition would be more properly addressed in a treaty negotiated between States. If a definition of armed conflict is thought necessary, the one contained in article 2 seems doubtful, in that it is quite different from any contemporary treatment in modern treaties or judicial decisions. Furthermore, the terms "military occupation" and "armed conflict" have distinct meanings in the law of armed conflict and thus should be referred to separately, if at all.

2. A better approach in draft article 2 would be to make clear that armed conflict refers to the set of conflicts covered by common articles 2 and 3 of the 1949 Geneva Conventions (i.e., international and non-international armed conflicts).

3. Draft article 3
Non-automatic termination or suspension

Burundi

[Original: French]

Burundi supports the position that the outbreak of an armed conflict does not necessarily terminate or suspend a treaty, although it may hinder its implementation. Therefore, a State exercising its right to self-defence must have the right to suspend the operation of a treaty that would conflict with its right to self-defence. In the area of fighting against impunity, this obligation has not yet been universally accepted by the international community, although it should be, just like obligations relating to other topical issues, such as terrorism, drug trafficking, etc. The question that arises is whether the examination of the matter of the fight against impunity should be addressed within the draft articles. In our opinion, this question should be dealt with, since its aim is to clarify the legal position and to promote the security of legal relations between States by stating, in draft article 3, that the outbreak of an armed conflict does not necessarily terminate or suspend the application of a treaty. That would be one way to compel States to feel bound to extradite or prosecute and try criminals and to eliminate impunity, so as to ensure justice worldwide by denying criminals refuge.

China

[Original: Chinese]

The principle in draft article 3 is conducive to maintaining the stability of international relations, and China is of the view that it can be used as a basis for the draft.

Colombia

[Original: Spanish]

This article is consistent with the general principles of international law and with the Vienna Convention on the Law of Treaties.

Ghana

[Original: English]

The outbreak of armed conflicts should not ipso facto lead to the suspension or termination of treaties.

Poland

[Original: English]

Poland applauds the general idea of the continuous existence and operation of treaties in times of armed conflict as consonant with the principle of *pacta sunt servanda* and the need for securing the stability of treaty relations. However, the provision requires clarification. Does it establish a presumption of the continuous existence and operation of treaties, similar to that expressed in article 42 of the Vienna Convention on the Law of Treaties, or does it simply provide that there is no presumption to the contrary? The word "necessarily", which now substitutes the words *per se* used originally by the Special Rapporteur, introduces ambiguity. By adding the word "necessarily", draft article 3 provides that treaties may or may not be automatically terminated or their operation suspended in case of an armed conflict. The question is whether the drafters intended to let treaties come to an end purely through the incidence of the outbreak of an armed conflict or whether express intent on the part of a State or both States involved in the armed conflict is required. If the former, then which categories of treaties may automatically terminate or become suspended?

Portugal

[Original: English]

1. Portugal welcomes the article, which contains a general rule of non-termination or suspension and well encapsulates the important principle of the stability of treaty relations. This may be a matter of policy rather than resulting from practice, as recognized by the Special Rapporteur himself in his concluding remarks in the 2008 report. Nevertheless, this is a key idea for Portugal, one that justifies working on a matter that was intentionally excluded from the Vienna Convention on the Law of Treaties.

2. Portugal does not share, however, suggestions made in paragraph 290 of the 2007 report to include additional clauses concerning justified armed conflict under international law, and the compatibility of such armed conflict with the object and purpose of the treaty or with the Charter of the United Nations. The stability of treaties, or their termination or suspension, should not be linked to the legality or illegality of the use of force.

Switzerland

[Original: French]

1. Switzerland believes that neither "automatically" nor "necessarily" fully translates the sense of "*ipso facto*". In its opinion, the clarity of this article would be enhanced by reverting to the expression chosen at the time by the Institute of International Law.

2. Furthermore, Switzerland believes that the presumption that treaties remain in effect during armed conflict should be emphasized more explicitly in the title of the article itself by replacing the existing title with "Presumption of continuity".

4. Draft article 4
Indicia of susceptibility to termination, withdrawal or suspension of treaties

Burundi

[Original: French]

The intention of the States parties at the time of conclusion of a treaty should be examined when it is necessary to determine whether or not a treaty remains in force.

China

[Original: Chinese]

China favours the comprehensive consideration of such factors as the intention of the parties to the treaty, the nature and extent of the armed conflict and the effect of the armed conflict on the treaty when armed conflict occurs, in order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension. China recommends that the Commission find an appropriate way to prevent the current draft from being misconstrued by the reader as an exhaustive list of all factors requiring consideration. China also recommends that the Commission consider listing other important factors requiring consideration, such as the possible results of terminating, withdrawing from or suspending a treaty.

Colombia

[Original: Spanish]

The wording is confusing, as "termination" refers to the treaty, while "withdrawal or suspension" refers to the State party. The wording of the first paragraph must be improved and the scope of the provision clarified.

Poland

[Original: English]

1. In the view of Poland, it is not clear what situation the provision purports to regulate, nor is it clear who is supposed to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, or when such a determination is to be made. Does the provision seek to guide States in their unilateral actions attempting to put an end to the operation of a treaty, or is it intended to guide courts in assessing ex post facto the legality of such actions undertaken by States during the armed conflict?

2. Article 4 lacks a solid framework within which to operate: the draft articles do not make clear whether a State involved in an armed conflict has a right to unilaterally put an end to its treaty obligations. Draft articles 8 and 11 provide conflicting answers to that question. Until that issue is clarified, draft article 4 remains disconnected, having no clear object and serving no clear purpose.

Portugal

[Original: French]

Parties are supposed to conclude treaties in good faith and with the intention to comply with them (*pacta sunt servanda*). It is thus very difficult to assess the parties' intention at the time of the conclusion of the treaty in the case of an outbreak of hostilities. Portugal thus supports the proposal of the Working Group on the Effects of Armed Conflicts on Treaties to leave aside "intention" as the predominant criterion for determining the susceptibility of treaties to termination or suspension. The new criteria in the provision are more appropriate.

United States of America

[Original: English]

The United States agrees that the determination as to whether a treaty is susceptible to termination or suspension in the event of an armed conflict is to be made based on the circumstances surrounding the particular treaty and armed conflict, and on articles 31 and 32 of the Vienna Convention on the Law of Treaties.

5. **Draft article 5 and annex**
Operation of treaties on the basis of implication from their subject matter

China

[Original: Chinese]

While China is of the view that the annex helps States to understand draft article 5 and is useful by virtue of its indicative nature, the treaties listed do not all conform to the conditions cited in draft article 5; moreover, the academic terms used in the list, such as "law-making treaties", have different interpretations in practice. China recommends that the Commission omit the list as an annex to the draft articles but retain information about the listed treaties in the commentary.

Colombia

[Original: Spanish]

While it is not feasible to envisage listing the treaties that may continue in operation or implementation, it may be possible, for the sake of greater clarity, to give a few examples of such treaties or of their subject matter.

Ghana

[Original: English]

The Commission may also give some thought to the effects of armed conflicts on treaties aimed at bringing a conflict to an end, including the Charter of the United Nations, given its unique status as a post-conflict treaty of a universal nature. The Commission may also explore the effects of armed conflicts on treaties aimed at promoting regional integration.

Poland

[Original: English]

In the view of Poland, article 5 is superfluous. Since there exists a general principle of survival of treaties, providing for specific categories of treaties that do not automatically cease their operation at the outbreak of an armed conflict is not needed. Retaining article 5 would be confusing: it may raise doubts as to the solidity of the principle of survival of treaties itself, in effect undermining the principle expressed in draft article 3.

Portugal

[Original: English]

Draft article 5 and the annex thereto have an important role in clarifying what kind of treaties cannot be terminated or suspended, thus helping the operativeness of draft article 4. In principle, Portugal supports the chosen method of categorization of treaties and the recommendation by the Working Group on the Effects of Armed Conflicts on Treaties in 2007 to replace "object and purpose" with "subject matter". However, the list should include an express reference to treaties codifying rules of *jus cogens*.

Switzerland

[Original: French]

1. Switzerland proposes that draft article 5 and its annex be restructured to consist of two paragraphs and one annex linked to paragraph 1, which would read as follows:

> "1. In the case of treaties the subject matter of which implies that they continue to operate, in whole or in part, during armed conflict, the incidence of an armed conflict will not as such affect their operation. An indicative list of the categories of such treaties is annexed hereto."

2. Paragraph 1 would cover the types of treaties enumerated therein. The current formulation would be retained, with an express reference to the annex, since the annex contains important information about the categories of treaties concerned.

3. In addition, the English formulation "treaties the subject matter of which involves the implication ..." is rather awkward and does not reflect the French formulation ("traités dont le contenu implique ..."). Such formulation should be replaced by "treaties the subject matter of which implies ..." Switzerland also proposes replacing the English formulation "that they continue in operation" with the formulation "that they continue to operate".

4. Switzerland proposes the addition of a paragraph 2 governing the applicability of a second type of treaty:

> "2. Treaties relating to the protection of the human person, including treaties relating to international humanitarian law, to human rights and to international criminal law, as well as the Charter of the United Nations, remain or become operative in the event of armed conflict."

5. The protection granted in draft article 5 against termination or suspension of treaties does not appear to be adequate for *all* types of treaties. Among those treaties that imply that they continue to operate, there is one type which is indisputably operative during an armed conflict. The need for absolute protection of these treaties is based on their fundamental significance in view of the aforementioned goals of the international community, and is reflected by their content as well as by relevant doctrine and jurisprudence. However, the present formulation of draft article 5 does not create different levels of protection. The basic treaties of international humanitarian law and human rights (subparas. (a) and (d)) do not enjoy stronger protection against termination or suspension than, for example, treaties relating to international watercourses and related installations and facilities (subpara. (f)). While Switzerland favours retaining an indicative list as an annex linked to paragraph 1, it is essential to stipulate, in paragraph 2 of draft article 5, that certain specific treaties can in no event be terminated, withdrawn or suspended in the event of an armed conflict.

6. As a model for such a paragraph, Switzerland proposes using the 1985 resolution of the Institute of International Law. Article 4 of the resolution stipulates that "[t]he existence of an armed conflict does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless the treaty otherwise provides".[3]

7. In our proposal, treaties relating to the protection of the human person, including treaties relating to international humanitarian law, to human rights and to international criminal law, as well as the Charter of the United Nations, remain or become operative in the event of armed conflict.

8. Treaties relating to international humanitarian law (which, in our opinion, do not form a subset of "treaties relating to the law of armed conflict" as suggested in subparagraph (a) of the annex) play a central role in the protection of individuals from the harmful effects of armed conflicts. It is clear from the texts of international humanitarian law instruments that they apply specifically to situations of armed conflict and are intended to govern various aspects of hostilities. Any understanding to the contrary would render such treaties entirely meaningless. Consequently, armed conflicts cannot affect the operation of these specific treaties.

9. Human rights treaties must also enjoy absolute protection. In our view, the operation of human rights treaties in the event of armed conflict does not appear in principle to be called into question. On a number of occasions, the International Court of Justice has affirmed that the protection offered by the International Covenant on Civil and Political Rights does not cease in time of war, except by operation of article 4 of the Covenant, whereby, under certain conditions, States parties may derogate, in time of public emergency, from certain obligations the Covenant imposes. The fact that numerous human rights treaties provide for the possibility of derogating from certain provisions in time of public emergency, including armed conflict, confirms that in principle these treaties remain in operation in the event of armed conflict. The possibility of derogation does not affect the continuation of the operation of a human rights treaty as such, but provides for a means of suspending certain provisions of the treaty in question.[4] The

[3] Institute of International Law, Session of Helsinki, *The Effects of Armed Conflicts on Treaties*, 28 August 1985.

[4] See also the commentary on draft article 5, para. 33.

principle according to which human rights treaties remain in operation in the event of armed conflict has been confirmed by treaty bodies, the General Assembly of the United Nations and the Security Council. Moreover, this principle is supported by numerous commentators in the legal literature. International humanitarian law, particularly article 72 of Protocol I to the Geneva Conventions, as well as the second preambular paragraph of Protocol II, also rely on this principle.

10. At the same time, it must be recognized that such a provision is without prejudice in two regards: first, to the possibility of derogating from certain provisions, as provided for in the derogation clauses of human rights treaties, and second, to the relationship between international humanitarian law and human rights. Indeed, according to doctrine, both fields of law are deemed to be concurrently applicable.

11. In the case of treaties relating to *international criminal law*, the memorandum by the Secretariat cites, among other instruments, the Rome Statute of the International Criminal Court, under the heading of "other treaties dealing with aspects of armed conflict".[3] It is true that a certain number of crimes defined in treaties under international criminal law could also be considered to be governed by human rights law (forbidding torture, for example), as well as international humanitarian law (such as grave breaches of the Geneva Conventions). Such is not the case, however, for all crimes governed by international law. Considering that these instruments protect the fundamental values of the international community, it would be advisable to have a second paragraph that clearly and explicitly guarantees their operation in the event of armed conflict.

12. Finally, Switzerland proposes the inclusion of the Charter of the United Nations. While it is true that draft articles 13 and 14 implicitly recognize the primacy of the Charter and therefore its application, it would be advisable to mention the Charter explicitly in a paragraph defining those treaties that are operative under all circumstances. In addition to identifying the primary purposes of the international community, which were mentioned above, the Charter sets forth the essential rules of *jus ad bellum* within the context of armed conflict. The annex should be amended to read:

"Annex

Indicative list of the categories of treaties referred to in draft article 5, paragraph 1

(a) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;

(b) Multilateral law-making treaties;

(c) Treaties establishing an international organization;

(d) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

(e) Treaties relating to diplomatic and consular relations."

[3] A/CN.4/550 and Corr.1 and 2, footnote 75.

13. As was stated above, an indicative list relating to paragraph 1 may in principle be useful. That said, the current formulation of the draft annex seems to be too wide-ranging and at the same time too specific to cover the cases that will no doubt arise in the future. It seems to us advisable to delete subparagraphs (a) and (b), which are covered by paragraph 2 of the proposed draft article 5. For the rest, Switzerland proposes the inclusion of the generic categories indicated above; they contain the current categories, which are in some cases too specific. For example, the treaties in present subparagraph (e) relating to the protection of the environment can be subsumed under new subparagraph (b). The fact that existing subparagraphs (f) and (g) form sub-units of the new subparagraph (a) is confirmed in the Commission's commentary.[6] Present subparagraph (j) can be included in new subparagraph (d). Because of the relationship between them, diplomatic and consular treaties can be placed together. In addition, it would in our view be desirable to add to the list the category of treaties establishing an international organization, such as the Rome Statute of the International Criminal Court. As for treaties of friendship, commerce and navigation and analogous agreements concerning private rights, Switzerland does not regard them as necessarily forming part of the categories in draft article 5, paragraph 1.

United States of America

[Original: English]

While the United States has some concerns with the effort in the annex to categorize by subject matter treaties that generally would continue in operation during armed conflict, it supports the decision to characterize this list of categories as indicative and non-exhaustive. In particular, it supports the statement in the commentary to article 5 that it may well be that only the subject matter of particular provisions of a treaty in one of these categories may carry the necessary implication of their continuance. For example, treaties of friendship, commerce and navigation often contain provisions regarding bilateral commerce that might need to be suspended during armed conflict between the parties.

6. Draft article 6
Conclusion of treaties during armed conflict

Colombia

[Original: Spanish]

It is redundant to mention lawful agreements in paragraph 2. Clearly, States are subject to the norms and principles of international law and, as subjects of international law, their acts must be guided by them.

Poland

[Original: English]

Draft article 6 should be deleted. There can be no doubt that involvement in an armed conflict does not and cannot impair the capacity of a State to conclude treaties. The capacity to conclude treaties is a component of State sovereignty and international personality.

[6] Commentary on draft annex to article 5, subparas. (f) and (g), paras. (38) and (45).

Switzerland

[Original: French]

Paragraph 2 must be understood as being without prejudice to article 9, given that States cannot legally agree to the termination of a treaty that is *jus cogens*, for example.

7. **Draft article 7**
Express provisions on the operation of treaties

Colombia

[Original: Spanish]

This provision is logical and is consistent with the *pacta sunt servanda* principle.

Poland

[Original: English]

Article 7 should be deleted because it states the obvious, and it is not needed in view of the general principle as embodied in article 3.

Switzerland

[Original: French]

It would be more logical to place draft article 7 immediately after article 4, since it is simply a particularly clear case of the application of article 4.

8. **Draft article 8**
Notification of termination, withdrawal or suspension

Poland

[Original: English]

1. The title of the article is misleading: the notification that is the subject of the article is not of termination, withdrawal or suspension but of the intent of a State to terminate, withdraw from or suspend the operation of a treaty. The difference is crucial. It reflects the idea that a State may not unilaterally terminate, withdraw from or suspend the operation of a treaty as a consequence of its engagement in an armed conflict. What it may do is to invoke the occurrence of an armed conflict as a ground for expressing its intent to terminate, withdraw from or suspend the operation of a treaty. If so, such a notification has no effects on the treaty until the other State so agrees. The only effect the notification has is to inform the other State or States of the relevant intent of the notifying State.

2. And yet, paragraph 3 spells out "the right" of a party to object, as if, without such an objection, the operation of the treaty could be put to an end unilaterally through a notification of intent to do so. The regulation is convoluted and does not provide guidance to States.

Switzerland

[Original: French]

1. Switzerland agrees with the Commission that draft article 8 is based on article 65 of the Vienna Convention on the Law of Treaties. The title of draft article 8 should be aligned with the title of article 65, so as to simply read "Procedure", especially as draft article 8 deals with the entire procedure of termination, withdrawal or suspension, not solely with notification.

2. Switzerland commends the decision to include a duty of notification as an element supporting the principle of stability pursuant to draft article 3. It nevertheless would have been appropriate to retain in paragraph 2 the phrase indicating that it is "the termination, withdrawal or suspension" which takes effect, with a view to clarifying the constitutive effect of notification.

3. It would be possible, by analogy with article 65, paragraph 2, of the Vienna Convention, to add a provision fixing a time limit for entering an objection. In view of the urgency normally associated with a situation of armed conflict, such a time limit could in our view be shorter than three months. Alternatively, paragraph 2 should specify that termination, suspension and withdrawal shall take effect once the notification has been received, in the absence of a prompt objection by the other party to the treaty.

4. In addition, it is important to mention the duty of notification in draft article 3, which specifies the non-automatic nature of termination or suspension, so as to make it clear that notification is a prerequisite for termination or suspension.

5. Switzerland recalls that the Commission did not wish to include a formulation equivalent to that of article 65, paragraph (4), in draft article 8, considering that "it was unrealistic to seek to impose a peaceful settlement of disputes regime for the termination, withdrawal from or suspension of treaties in the context of armed conflict". Switzerland wonders what the basis for this assessment was, and whether its outcome is really in conformity with the provisions of the draft articles. The Commission's assumption seems to be in contradiction with draft article 5 and the corresponding indicative list contained in the annex, given that, according to subparagraph (1), the incidence of an armed conflict as such will not affect the operation of treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice, because of the implication that they continue to operate.

6. In our view, rather, the question of whether it is possible in law to impose a peaceful settlement of disputes regime in relation to termination of a treaty, withdrawal of a party or suspension of the application of a treaty in the context of an armed conflict must be determined in the light of the criteria specified by the Commission elsewhere in the draft articles, in particular articles 4, 5 and 7. Draft article 8, paragraph 3, should be reviewed in the light of these considerations so that the draft articles do not affect the right of a party to have recourse to a peaceful settlement of disputes regime in a case where the continued operation of a treaty that makes provision for such a regime is involved pursuant to the above-mentioned draft articles.

United States of America

[Original: English]

Paragraph 2 should be made subject to the proviso: "unless the notice states otherwise", in order to preserve the possibility, for a State wishing to do so, of providing notice in advance of the effective date of termination.

9. Draft article 9
Obligations imposed by international law independently of a treaty

Ghana

[Original: English]

While a treaty is rendered ineffective by the occurrence of an armed conflict, it should not necessarily derogate from a State's treaty obligation assumed under pre-existing or prevailing customary rules of international law generally recognized to be binding on all States under international law.

Switzerland

[Original: French]

In the view of Switzerland, it is important to recall this principle in the context of the draft articles. In addition, it is appropriate to mention explicitly in the commentary on this draft article the category of rules of *jus cogens*.

10. Draft article 10
Separability of treaty provisions

Colombia

[Original: Spanish]

The meaning of the term "unjust" in paragraph (c) is not clear.

11. Draft article 11
Loss of the right to terminate, withdraw from or suspend the operation of a treaty

China

[Original: Chinese]

Draft article 11 could give rise to differing interpretations. China understands that the circumstances resulting in a State's loss of its right to terminate, withdraw from or suspend the operation of a treaty as described in this article arise after the outbreak of armed conflict, otherwise it would conflict with the Commission's original intent in designing it along the lines of article 45 of the Vienna Convention on the Law of Treaties, as well as with the goals of the present draft. The Commission should amend the present text accordingly to clarify the relevant content.

Colombia

[Original: Spanish]

Unilateral conduct is, by acquiescence, a source of international law, so paragraph (b) is acceptable.

Poland

[Original: English]

Draft article 11 is the only provision which expressly admits that a State engaged in an armed conflict may — as a consequence of the armed conflict — terminate, withdraw from or suspend the operation of a treaty. However, no such right exists under the draft articles. The transposition of article 45 of the Vienna Convention into draft article 11 was done without paying attention to the differences between the Vienna Convention and the draft articles. Article 45 of the Vienna Convention refers to the *right to invoke a ground for* termination, withdrawal from or suspension of a treaty. Article 45 does not refer to the *right to* terminate, withdraw from or suspend a treaty, because under the Vienna Convention no such right exists. The question about the right of a State to terminate, withdraw from or suspend the operation of a treaty must be answered as a matter of principle.

12. **Draft article 12**
Resumption of suspended treaties

Colombia

[Original: Spanish]

It does not seem appropriate to exclude, from the outset, the possibility that the parties may express their wish to resume the operation of a treaty and that they may agree on such resumption and on the conditions thereof, in exercise of the authority of sovereign States. It is important to read this article in conjunction with article 18 and to consider merging them into a single article.

Poland

[Original: English]

The relationship with article 18 is unclear.

Switzerland

[Original: French]

Given the relationship and substantive links between draft articles 12 and 18, Switzerland believes that it would be more logical if they were placed one after the other.

13. **Draft article 13**
Effect of the exercise of the right to individual or collective self-defence on a treaty

China

[Original: Chinese]

China has taken note of a discrepancy in the texts of draft article 13 as contained in documents A/CN.4/L.727/Rev.1 and A/63/10. China understands that the additional formulation about bearing in mind the consequences of aggression in the wording of the former could help reduce the risk that the draft article may be abused, but recommends that the Commission further consider the relationship of the article to draft articles 14 and 15.

Portugal

[Original: English]

Portugal considers that the draft articles should be developed on the basis of the law of treaties and not the use of force. Accordingly, the question of self-defence should not be addressed. In an armed conflict, it is usually difficult to ascertain who is the aggressor and who is the victim. The illegality of a use of force does not affect the question whether an armed conflict has an automatic or necessary outcome of suspension or termination.

Switzerland

[Original: French]

It seems appropriate to clarify that even a State exercising its right to self-defence remains subject to the provisions of draft article 5, and Switzerland proposes that the draft article be amended accordingly.

United States of America

[Original: English]

The United States has concerns that draft article 13 could be misread to suggest that a State acting in self-defence has a general right to suspend treaty provisions that may affect its exercise of self-defence. At a minimum, the commentary should clarify that, to the extent such a right exists, it would be a limited right that does not affect treaty provisions that are designed to apply in armed conflict, in particular the provisions of treaties on international humanitarian law and the regulation of armed conflict such as the Geneva Conventions of 1949.

14. **Draft article 15**
Prohibition of benefit to an aggressor State

Burundi

[Original: French]

It is worth considering whether, under the Charter of the United Nations, it could be assumed that there is no difference in the legal effects on a treaty between an aggressor State and a State exercising self-defence.

China

[Original: Chinese]

China acknowledges the policy considerations of draft article 15. However, if the aggressor State terminates or suspends a treaty in accordance with the provisions of that treaty itself, a conflict arises between the provisions of this article and those of the treaty in question. The draft articles give no indication as to how such a conflict is to be resolved. The Commission should further clarify this issue, as well as that of whether or not to create similar provisions with regard to unlawful use of force other than aggression.

Colombia

[Original: Spanish]

It would be worthwhile to specify whether "armed conflict", as referred to in this article, is the result of aggression.

Portugal

[Original: English]

Although sharing the opinion that an aggressor State cannot be placed in the same position as the State exercising its right to self-defence for the purposes of asserting the lawfulness of a conduct, Portugal reiterates its firm belief that this topic must remain within the framework of the law of treaties and must avoid dealing with aspects related to the law on the use of force. Portugal is further concerned about the linking of the draft article to particular definitions of aggression.

Switzerland

[Original: French]

Switzerland appreciates the importance of this draft article. It wonders, nevertheless, whether it would not be appropriate to broaden the scope of the prohibition on benefiting from termination or suspension of a treaty to situations in which a State resorts to illegal *threat or use of force* within the meaning of article 2, paragraph 4, of the Charter of the United Nations, rather than covering only aggression.

United States of America

[Original: English]

Draft article 15 is problematic to the extent that it incorporates the definition of aggression set forth in General Assembly resolution 3314 (XXIX), in which the Assembly recommended that the Security Council, as appropriate, take account of that definition as guidance in determining, in accordance with the Charter of the United Nations, the existence of an act of aggression. By directly incorporating that definition into draft article 15 and specifying the legal consequences that flow from actions falling within the definition, the United States believes that the provision fails to properly recognize the process described in the Charter of the United Nations for making an authoritative determination of aggression, and arguably

leaves to the belligerent State the ability to decide whether it has committed aggression. In addition, this provision may be unnecessarily limited in scope as it does not address circumstances where a State has illicitly used force in a way that does not amount to aggression. The United States recommends that the reference to resolution 3314 (XXIX) be deleted and that the first clause of the article provide as follows: "[a] State committing an act of aggression as determined in accordance with the Charter of the United Nations shall not terminate ...".

15. **Draft article 16**
Rights and duties arising from the laws of neutrality

Switzerland

[Original: French]

Draft article 16 is of particular importance to Switzerland, which agrees with both its formulation and form as a "without prejudice" clause.

16. **Draft article 17**
Other cases of termination, withdrawal or suspension

Colombia

[Original: Spanish]

It would suffice to mention in this article that the draft articles are to be understood as being without prejudice to the termination or suspension of, or withdrawal from, treaties that may occur for other reasons within the framework of international law.

Cuba

[Original: Spanish]

Cuba considers that definitions should be provided in draft article 17, paragraphs (b) and (d), as to what is understood by "material breach" and "fundamental change of circumstances".

17. **Draft article 18**
Revival of treaty relations subsequent to an armed conflict

Colombia

[Original: Spanish]

See the comment on draft article 12.

Poland

[Original: English]

The relationship with article 12 is unclear.

Switzerland

[Original: French]

See the comment on draft article 12.

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Settlement of disputes clauses

Note by the Secretariat

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I. Introduction

1. At its sixty-first session, in 2009, the International Law Commission decided that, at its sixty-second session, it would devote at least one meeting under the agenda item "Other matters" to a discussion of "Settlement of disputes clauses". In that connection, the Commission requested the Secretariat "to prepare a note on the history and past practice of the Commission in relation to such clauses, taking into account recent practice of the General Assembly".[1] The present note has been prepared pursuant to that request.

2. The present note is divided into three parts. The first part (section II below) provides an overview of the history of the study by the Commission of topics related to the settlement of disputes. The second part (section III) details the practice followed by the Commission in relation to settlement of disputes clauses. It first examines relevant clauses as they have been included in draft articles adopted by the Commission; it then considers other draft articles in which the inclusion of such clauses, while substantially discussed, has not been eventually retained. For each set of draft articles, a brief description is provided of the factors considered by the Commission in deciding to include, or not, settlement of disputes clauses and, if applicable, of the settlement of disputes clause eventually included in the instrument. Finally, the third part (section IV) provides information on the recent practice of the General Assembly in relation to settlement of disputes clauses inserted in conventions which have not been concluded on the basis of draft articles adopted by the Commission.

II. Topics relating to the settlement of disputes completed or already considered for possible future study by the Commission

3. At its tenth session, in 1958, the Commission completed its study of arbitral procedure by adopting a set of model rules on the issue. Since then, the Commission has not considered topics directly dealing with the settlement of disputes but addressed on several occasions the possibility of devoting a study to specific aspects of that legal field.

A. Model Rules on Arbitral Procedure, 1958

4. At its first session, in 1949, the Commission selected arbitral procedure as one of the topics for codification to which it gave priority and appointed Georges Scelle as Special Rapporteur.[2] The Commission considered this topic at its second, fourth, fifth, ninth and tenth sessions, in 1950, 1952, 1953, 1957 and 1958, respectively. In 1952, the Commission adopted on first reading a draft on arbitral procedure and communicated it to Governments for comments.[3] The following year, the

[1] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), p. 366, para. 238.

[2] See *Yearbook of the International Law Commission 1949*, p. 281, paras. 17 and 21.

[3] *Yearbook ... 1952*, vol. II, p. 58, para. 14.

Commission adopted the revised draft on arbitral procedure.[4] In its report on the fifth session to the General Assembly, the Commission expressed the view that the draft, which was then intended to be final, should be recommended to Member States with a view to the conclusion of a convention.[5]

5. The Commission emphasized that the draft had a dual aspect, representing both a codification of existing law on international arbitration and a formulation of what the Commission considered to be desirable developments in the field.[6] Thus the Commission had taken as a basis the traditional features of arbitral procedure in the settlement of international disputes, such as those relating to the undertaking to arbitrate, the constitution and powers of an arbitral tribunal, the general rules of evidence and procedure and the award of arbitrators. At the same time, the Commission had also provided certain procedural safeguards for securing the effectiveness, in accordance with the original common intention of the parties, of the undertaking to arbitrate.[7]

6. The draft was considered by the General Assembly at its eighth and tenth sessions, in 1953 and 1955, and subjected to criticism, particularly in view of the Commission's recommendation for the conclusion of a convention on the topic. The Assembly, in resolution 989 (X) of 14 December 1955, noting that a number of suggestions for improvements on the draft had been put forward, invited the Commission to consider the comments of Governments and the discussions in the Sixth Committee in so far as they might contribute further to the value of the draft on arbitral procedure, and to report to the Assembly at its thirteenth session.

7. At its ninth session, in 1957, the Commission appointed a committee to consider the matter in the light of the General Assembly resolution.[8] The committee came to the conclusion that it would be necessary for the Commission to decide on the ultimate object to be attained in reviewing the draft on arbitral procedure and, in particular, whether that object should be a convention or simply a set of rules which might inspire States, wholly or in part, in the drawing up of provisions for inclusion in international treaties and special arbitration agreements. The Commission decided in favour of the second alternative.[9]

8. At its tenth session, in 1958, the Commission adopted a set of "Model Rules on Arbitral Procedure" followed by a general commentary.[10] In submitting the final set to the General Assembly in the report on its tenth session, the Commission recommended that the Assembly adopt the report by resolution.[11] The Assembly, in resolution 1262 (XIII) of 14 November 1958, took note of chapter II on arbitral procedure of the Commission's report on its tenth session, brought the draft articles on arbitral procedure to the attention of Member States for their consideration and use, and invited Governments to send to the Secretary-General any comments they

[4] *Yearbook ... 1955*, vol. II, p. 208, para. 57.

[5] Ibid., para. 55.

[6] Ibid., para. 54.

[7] For example, in order to prevent one of the parties from avoiding arbitration by claiming that the dispute in question was not covered by the undertaking to arbitrate, the draft provided for a binding decision by the International Court of Justice as to the arbitrability of the dispute (article 2).

[8] *Yearbook ... 1957*, vol. II, p. 143, para. 18.

[9] Ibid., pp. 143 and 144, para. 19.

[10] *Yearbook ... 1958*, vol. II, p. 83, para. 22.

[11] Ibid., p. 82, para. 17.

might wish to make on the draft, and in particular on their experience in the drawing up of arbitral agreements and the conduct of arbitral procedure, with a view to facilitating a review of the matter by the United Nations at an appropriate time.

B. Topics relating to the settlement of disputes already considered for possible future study by the Commission

1. Review of the "pacific settlement of international disputes" as a possible topic for codification in 1949

9. At its first session, in 1949, the Commission undertook a survey of the whole field of international law with a view to selecting particular topics the codification of which it considered necessary or desirable.[12] On the basis of a proposal by Ricardo J. Alfaro,[13] the Commission had an exchange of views on the necessity of retaining the pacific settlement of international disputes as a suitable topic. A variety of opinions was expressed, some members of the Commission indicating that the question was only procedural or pertaining to progressive development, while others supported the proposal on the understanding that a study of the topic by the Commission should not duplicate the work done by the Interim Committee of the General Assembly.[14] At the end of that debate,[15] the Commission eventually decided not to include the topic in the provisional list of those selected for codification.[16]

2. Consideration by the Commission of the subject of the peaceful settlement of disputes on the basis of the "Survey of international law" prepared by the Secretary-General in 1971

10. At its twentieth session, in 1968, the Commission decided to give attention to its long-term programme of work and for that purpose asked the Secretary-General to prepare a new survey of the whole field of international law on the lines of the memorandum entitled "Survey of international law in relation to the work of codification of the International Law Commission" (A/CN.4/1/Rev.1),[17] submitted at the Commission's first session in 1949. On the basis of such a new survey, the Commission could then draw up a list of topics that were ripe for codification. Pursuant to that request, the Secretariat submitted, at the twenty-second session of the Commission, in 1970, a preparatory working paper concerning the review of the Commission's programme of work.[18] In the part of that working paper devoted to topics suggested or recommended for inclusion in the Commission's programme of work, the Secretariat summarized views and proposals put forward by Member States regarding the pacific settlement of international disputes, particularly in

[12] See *Yearbook ... 1949*, p. 280, para. 13.

[13] Ibid., p. 43, para. 70.

[14] Ibid., pp. 43 and 44, paras. 69-82.

[15] The Chairman of the Commission, Manley O. Hudson, concluded that "the general opinion for the moment did not favour retaining the question of the pacific settlement of international disputes among the topics the codification of which seemed necessary or desirable" (ibid., p. 44).

[16] Ibid., p. 281, para. 16. The topic "arbitral procedure" was separately included in the provisional list (see sect. II.A above).

[17] United Nations publication, Sales No. 1948.V.1(1).

[18] See *Yearbook ... 1970*, vol. II, p. 247, document A/CN.4/230.

respect of the "recourse to procedures for investigation, mediation and conciliation"[19] and of the "obligatory jurisdiction of the International Court of Justice".[20] The Secretariat also indicated that the study of the topic "Model rules on conciliation" had also been suggested by a member of the Commission in 1967.[21]

11. At its twenty-third session, in 1971, the Commission had before it another working paper entitled "Survey of International Law",[22] prepared by the Secretary-General in response to the Commission's request referred to above. The working paper contained some information regarding the consideration by the Commission of the subject of the peaceful settlement of disputes;[23] it contained a concluding assessment reading as follows:

> The Commission has not in general been concerned, when elaborating texts setting out substantive rules and principles, with determining the method of implementation of those rules and principles, or with the procedure to be followed for resolving differences arising from the interpretation and application of the substantive provisions — with one exception. That exception arises when the procedure is seen as inextricably entwined with, or as logically arising from, the substantive rules and principles, or, in the Commission's words "as an integral part" of the codified law. Otherwise the question of the settlement of disputes and, indeed, of implementation as a whole, have been regarded as issues to be decided by the General Assembly or by the codification conference of plenipotentiaries which acts on the draft.[24]

12. The Commission considered the issue in the context of its review of its long-term programme of work both in 1971 and during its twenty-fifth session, in 1973.[25] It listed the "peaceful settlement of disputes" as one of the "[o]ther topics on which one or more members thought that the Commission might envisage undertaking work",[26] and decided to give further consideration to the various proposals suggested in the course of future sessions.[27]

3. Topics relating to settlement of disputes listed as possible future topics under the long-term programme of work in 1996

13. At its forty-eighth session, in 1996, the Commission decided to establish a working group on the long-term programme of work to assist it in selecting topics for future study.[28] As a result of that exercise, the Commission established a scheme of 13 "very general fields of public international law governed mainly by rules of customary international law".[29] Under each of those fields, the committee listed topics which had already been completed, those which had been previously

[19] Ibid., pp. 262 and 263, paras. 92 and 93.
[20] Ibid., p. 263, paras. 97-100.
[21] Ibid., p. 269, para. 143; see also *Yearbook ... 1967*, vol. I, p. 188, 929th meeting, para. 73.
[22] See *Yearbook ... 1971*, vol. II (Part Two), p. 24, document A/CN.4/245.
[23] Ibid., pp. 31-34, paras. 130-144.
[24] Ibid., pp. 33 and 34, para. 144 (the exception referred to concerned the provision for the settlement of disputes relating to the invalidity, termination and suspension of the operation of treaties, included in the draft articles on the law of treaties; see sect. III.A.4 below).
[25] See *Yearbook ... 1973*, vol. II, pp. 230 and 231, paras. 170-176.
[26] Ibid., para. 173.
[27] Ibid., p. 231, para. 174.
[28] See *Yearbook ... 1996*, vol. II (Part Two), p. 97, para. 244.
[29] Ibid., annex II, p. 133, para. 2 (a).

proposed by the Commission or by individual members, and "some possible topics on which the Commission does not intend to take a firm position on their feasibility for future work".[30] Under the field "Settlement of disputes", the Commission mentioned the Model Rules on Arbitral Procedure as the only topic already completed.[31] As possible future topics, together with the "Pacific settlement of international disputes [1949]",[32] it listed "Model clauses for the settlement of disputes relating to application or interpretation of future codification conventions" and "Mediation and conciliation procedures through the organs of the United Nations".[33] Since then, the Commission has not addressed the settlement of disputes as a potential topic for future study; reference to such a possibility was, however, expressly made during the final debate on the draft articles on responsibility of States for internationally wrongful acts.[34]

III. Practice of the Commission in relation to settlement of disputes clauses

14. Although no general debate has so far been held by the Commission regarding settlement of disputes clauses,[35] the possibility and ways of including such clauses have frequently been addressed in the course of discussions on specific draft articles. The present section examines in turn the clauses eventually included in the draft articles adopted by the Commission, and other draft articles in which the inclusion of such clauses, while substantially discussed, has not been finally retained. In each case, the factors considered by the Commission in deciding upon the clauses and, if applicable, the mechanism eventually adopted in the instrument are briefly described.

A. Settlement of disputes clauses included in drafts adopted by the Commission

15. This section examines the provisions regarding settlement of disputes included in the final drafts adopted by the Commission on various topics of international law. For each instrument, it describes the settlement of disputes mechanism; the rationale for the inclusion of such a regime as it emerges from the discussion in the Commission; and any subsequent action taken by the General Assembly or the diplomatic conference.

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[30] Ibid., para. 2 (c).

[31] See sect. II.A above.

[32] See sect. II.B.1 above.

[33] See *Yearbook ... 1996*, vol. II (Part Two), annex II, p. 136.

[34] During the plenary debate, one member indicated that "The question of dispute settlement was undoubtedly a fundamental problem in itself, a general problem on which the Commission might one day, in the framework of its long-term programme of work, prepare some sort of model clauses on dispute settlement for insertion in the codification conventions" (*Yearbook ... 2001*, vol. I, pp. 14 and 15, para. 40 (2668th meeting)).

[35] For the purposes of the present note, "settlement of disputes clauses" are understood either as those which have been considered as such by the Commission or as those which refer to one or several of the peaceful means of settlement of disputes enumerated in Article 33 of the Charter of the United Nations.

1. Draft convention on the reduction of future statelessness and draft convention on the elimination of future statelessness, 1954

16. The two draft conventions adopted by the Commission in 1954 contained identical settlement of disputes clauses, according to which the parties undertook to establish an agency to act on behalf of stateless persons and, within the framework of the United Nations, a tribunal to decide both complaints presented by that agency on behalf of the persons concerned and disputes brought by the parties. The parties also agreed that any dispute between them not referred to the tribunal be submitted to the International Court of Justice.[36]

17. At its fifth session, in 1953, the Commission concluded that the establishment of an agency representing stateless persons and of a tribunal where those persons, through the agency, could bring their claims, was necessary given the specific and vulnerable situation of persons threatened with statelessness; the details of the organization of the agency and the tribunal were, however, in the opinion of the Commission, to be provided by the contracting parties.[37] During the sixth session, different views were expressed as to the possibility of establishing the tribunal as a procedure of first instance and the International Court of Justice as an appellate jurisdiction: some members of the Commission mentioned as a potential issue of dual jurisdiction the possibility of having the tribunal and the Court dealing with the same submission simultaneously. The objection to establishing such a tribunal expressed by some Governments in their comments was also recalled during the debate in plenary.[38] The Commission finally decided that jurisdiction on disputes between the parties should be vested with the "special tribunal" but that those disputes, if not referred to the tribunal, should be adjudicated by the International Court of Justice.[39]

18. The text of the Convention on the Reduction of Statelessness adopted at the United Nations Conference on the Elimination or Reduction of Future Statelessness in 1961 only retained the submission to the International Court of Justice at the request of any party to the dispute if the difference could not be settled by other means.[40] The idea of establishing an agency to act on behalf of stateless persons and a tribunal was not ultimately retained.

2. Articles concerning the law of the sea, 1956

19. In the Articles concerning the law of the sea adopted by the Commission in 1956, two sets of settlement of disputes procedures were provided for disputes regarding living resources of the high seas and the continental shelf, respectively.[41] A seven-member arbitral commission which could order preliminary measures and take decisions binding upon the parties in dispute was designed to settle disputes concerning the living resources, while disputes regarding the continental shelf were to be submitted to the International Court of Justice at the request of any of the parties to the dispute, unless they agreed on another method of peaceful settlement.

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[36] *Yearbook ... 1954*, vol. II, p. 145 (article 11 of both conventions).

[37] *Yearbook ... 1953*, vol. II, pp. 227 and 228, paras. 157-160.

[38] *Yearbook ... 1954*, vol. I, pp. 12-14, paras. 12-39 (244th meeting); p. 15, paras. 13-21 (245th meeting).

[39] *Yearbook ... 1954*, vol. II, p. 142, paras. 23 and 24.

[40] United Nations, *Treaty Series*, vol. 989, No. 14458. See article 14.

[41] *Yearbook ... 1956*, vol. II, pp. 263 and 264 (articles 57-59 and 73, respectively).

20. A wide variety of views was expressed in the Commission concerning the procedure for solving disputes regarding the living resources of the high seas. The insertion of a compulsory arbitration clause was opposed on the ground that the task of the Commission was to codify or develop the law but not to safeguard its application.[42] For some members, a general reference to existing provisions imposing on States an obligation to settle their disputes peacefully was sufficient.[43] The majority, however, was of the view that an impartial authority was essential to secure the effective application of the draft articles,[44] and that the idea of an ad hoc arbitral commission would be more likely to be accepted by States than that of a central permanent judicial authority.[45]

21. There were also several approaches in the Commission concerning the settlement of disputes regime for the continental shelf. Initially, the Articles only contained a general arbitration clause.[46] The main reason for including such a clause instead of simply referring to the peaceful means of settlement of disputes provided in Article 33 of the Charter was to reconcile the rights of coastal States and the long-respected freedom of the high seas, and to leave room for "a measure of elasticity and discretion" in this exercise of reconciliation.[47] The Commission later amended the article and provided that disputes regarding the continental shelf should be submitted to the International Court of Justice at the request of any of the parties, unless they agreed on another method of peaceful settlement.[48] In doing so, the majority of the Commission dissociated itself from the objection made by some members to the effect that the insertion of such a clause would render the draft "unacceptable to a great many States".[49] It also deliberately differentiated itself from the arbitral commission regime designed for disputes regarding living resources in the high seas, on the ground that matters regarding the continental shelf would not be "of an extremely technical character as in the case of the conservation of the living resources of the sea".[50]

22. During the debate on the topic, the Commission also considered the possibility of adopting a rule pursuant to which all disputes concerning the breadth of the territorial sea should be submitted to the compulsory jurisdiction of the International Court of Justice.[51] The Commission decided, however, not to include such a clause on the ground that "the international community had not yet succeeded in formulating a rule of law" on the matter, which would make it inappropriate to "delegate an essentially legislative function to a judicial organ".[52]

23. The Convention on Fishing and Conservation of Living Resources of the High Seas adopted in 1958[53] contains an arbitral commission procedure similar to that included in the draft prepared by the Commission. All other matters arising out of

[42] *Yearbook ... 1956*, vol. II, p. 288, para. 17.
[43] Ibid.
[44] *Yearbook ... 1956*, vol. II, p. 288, para. 18.
[45] *Yearbook ... 1956*, vol. II, p. 288, para. 19.
[46] *Yearbook ... 1953*, vol. II, p. 213.
[47] *Yearbook ... 1953*, vol. II, p. 217, para. 87.
[48] *Yearbook ... 1956*, vol. II, p. 300, article 73.
[49] Ibid., commentary to article 73, para. 4.
[50] Ibid., para. 3.
[51] *Yearbook ... 1956*, vol. II, p. 266, commentary to article 3, para. 9.
[52] Ibid.
[53] United Nations, *Treaty Series*, vol. 559, No. 8164. See articles 9-12.

the interpretation or application of any of the conventions on the law of the sea of 1958 are subject to the compulsory jurisdiction of the International Court of Justice as stipulated in the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes.[54]

3. Draft articles on diplomatic intercourses and immunities, 1958

24. Article 45 of the draft articles on diplomatic intercourses and immunities adopted by the Commission in 1958 provided that, when disputes concerning the interpretation or application of the Convention could not be settled through diplomatic channels, they should be referred to conciliation or arbitration or, failing that, they should, at the request of either of the parties, be submitted to the International Court of Justice.[55]

25. During the Commission's debate on the topic, different opinions emerged on whether, where in the draft and in what form a settlement of disputes clause should be adopted. Some members believed that the Commission should focus on the codification of substantive rules, without dealing with the question of their implementation, while others suggested dealing with the settlement of disputes procedure in the form of a protocol. For the majority, however, it was necessary to provide for a dispute settlement procedure ultimately referring to the jurisdiction of the Court in the text, if the draft were to be submitted in the form of a Convention.[56]

26. The Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, adopted in 1961,[57] contains a procedure which is substantially identical to that proposed by the Commission.

4. Draft articles on the law of treaties, 1966

27. In the draft articles on the law of treaties adopted in 1966, the Commission designed a specific procedure of notification to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty.[58] Draft article 62 provided in particular that, if an objection to the notification by one party was raised by any other party, the parties should seek a solution through the means indicated in Article 33 of the Charter of the United Nations.[59]

28. The necessity of including a general reference to the peaceful settlement of disputes in the specific context of invalidity, termination or suspension of the operation of a treaty was first emphasized by the Commission as a means to limit the effect that arbitrary assertions may have on the stability of treaties.[60] Although some members of the Commission supported, especially during the first reading of the draft articles,[61] the need to provide for compulsory judicial settlement by the International Court of Justice should the parties fail to agree on another means of settlement, the Commission eventually confined itself to a mere reference to Article 33 of the Charter, on the understanding that the establishment in the draft of these

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[54] Ibid., vol. 450, No. 6466.

[55] *Yearbook ... 1958*, vol. II, p. 105.

[56] Ibid.

[57] United Nations, *Treaty Series*, vol. 500, No. 7312.

[58] *Yearbook ... 1966*, vol. II, p. 261, draft article 62.

[59] *Yearbook ... 1966*, vol. II, p. 262, draft article 62, para. 3.

[60] See *Yearbook ... 1963*, vol. II, p. 214, commentary to draft article 51, para. 1.

[61] See ibid., p. 215, para. 2.

procedural provisions "as an integral part of the law relating to the invalidity, termination and suspension of the operation of treaties" would be "a valuable step forward".[62]

29. In the 1969 Vienna Convention on the Law of Treaties,[63] the settlement of disputes procedure is provided for in two separate articles. Article 65, dealing with the procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty, is substantially identical to draft article 62 as adopted on second reading by the Commission. Article 66 specifically details the procedures for judicial settlement, arbitration and conciliation to be followed in cases in which the notifying and objecting parties under article 65 have not been able to solve their dispute within a period of 12 months. At the United Nations Conference on the Law of Treaties, the settlement of disputes relating to the application of norms of *jus cogens* was given specific consideration: according to article 66 (a) of the Vienna Convention, unless the parties agree to resort to arbitration, any of them may request a decision from the International Court of Justice when the dispute relates to the application or interpretation of article 53 or 64 of the Convention. For disputes relating to any other provision in part V of the Convention, any of the parties may set in motion the procedure of conciliation specified in the Annex to the Convention.

5. Draft articles on the representation of States in their relations with international organizations, 1971

30. In the draft articles on the representation of States in their relations with international organizations, adopted at the twenty-third session, in 1971, the Commission included a dual mechanism for the settlement of disputes. Draft article 81 first organized a procedure of consultations, should a dispute arise between the sending State, the host State and the organization, to be held at the request of any of them.[64] If the dispute could not be disposed of as a result of this initial process, draft article 82 provided that it be either submitted to any procedure established in the organization or, at the request of any State party to the dispute, to a conciliation commission to be constituted in accordance with the provisions of the article.[65]

31. Initially, the Commission had only envisaged including in the draft articles a provision regarding the possible holding of consultations.[66] In the light of comments received from some Governments,[67] the Commission later re-examined the question and added, in draft article 82, the utilization of any procedure available in the organization, as "the logical steps following the consultation in case they prove unsatisfactory",[68] and the conciliation procedure, as "the largest measure of common ground that could be found at present among Governments as well as in the Commission on the question".[69]

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[62] *Yearbook ... 1966*, vol. II, p. 263, commentary to draft article 62, para. 6.
[63] United Nations, *Treaty Series*, vol. 1155, No. 18232.
[64] *Yearbook ... 1971*, vol. II (Part One), p. 333.
[65] Ibid., draft article 82, para. 1.
[66] See *Yearbook ... 1969*, vol. II, p. 221, draft article 50.
[67] See *Yearbook ... 1971*, vol. II (Part One), p. 334, commentary to draft article 82, para. 5.
[68] Ibid., para. 7.
[69] Ibid., para. 6.

32. In the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, concluded in Vienna on 14 March 1975,[70] the settlement of disputes regime is provided in articles 84 and 85. Article 84 is largely similar to draft article 81, although it does not put the organization on an equal footing with the States parties to the dispute. Article 85 mainly deals with the submission of the dispute to, and the composition and functions of, the conciliation commission; it specifies that the recommendations formulated by the commission shall not be binding on the parties to the dispute unless they all have accepted them.

6. Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, 1972

33. Although the Commission retained in its draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons a settlement of disputes clause similar in some respects to the one adopted in the draft articles on the representation of States in their relations with international organizations, it took an innovative approach to the manner in which such a clause was to be incorporated in the text. Article 12 of the draft adopted at the twenty-fourth session, in 1972, was indeed presented in alternative formulations providing, respectively, for the reference of the dispute to conciliation (alternative A) or to an optional form of arbitration (alternative B).[71] As emphasized by the Commission itself, alternative A "reproduce[d], with the requisite adaptations, article 82 of the draft articles on the representation of States in their relations with international organizations".[72] As to alternative B, it provided for compulsory arbitration, accompanied by the possibility of referring the dispute to the International Court of Justice should the parties fail to agree on the organization of the arbitration, but expressly included a provision allowing the parties to make a reservation to that particular article.[73]

34. In deciding to include in the draft these alternative methods of settlement of disputes, the Commission had to make a number of assessments. First, it considered that "a variety of disputes could arise out of the draft articles",[74] although some of its members were of a different opinion and believed that potential disputes under the draft articles would, by their nature, be "unamenable to the application of settlement procedures".[75] Secondly, the Commission concluded that the conciliation or arbitration procedures "represent[ed] the largest measure of common ground that would appear to exist at present among Governments on the question of dispute settlement"[76] and decided to submit alternative formulations as a way of "seeking an expression of views from Governments"[77] on the issue.

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[70] See *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II (United Nations publication, Sales No. E.75.V.12).

[71] See *Yearbook ... 1972*, vol. II, pp. 321 and 322, draft article 12.

[72] Ibid., p. 322, commentary to draft article 12, para. 3.

[73] Ibid., para. 4.

[74] Ibid., para. 1.

[75] Ibid.

[76] Ibid.

[77] Ibid.

35. Article 13 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[78] adopted in 1973, provides a procedure very similar to that embodied in alternative B of draft article 12.

7. Draft articles on the law of treaties between States and international organizations or between international organizations, 1982

36. In addressing the issue of the settlement of disputes in the context of the law of treaties between States and international organizations or between international organizations, the Commission referred both to its own draft articles on the law of treaties adopted in 1966 and to the additions brought to this general provision during the United Nations Conference on the Law of Treaties. The draft articles on the law of treaties between States and international organizations or between international organizations adopted by the Commission at its twenty-fourth session in 1982, thus substantially reproduced the mechanism established under the 1969 Vienna Convention on the Law of Treaties,[79] with some modifications justified by the particularities entailed by the potential involvement of an international organization in the dispute.

37. Emphasizing that the system it had proposed regarding the procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty had been endorsed during the Conference on the Law of Treaties, the Commission decided to extend it to the draft articles, so as "to ensure a fair procedure for the [parties] in dispute, based on notification, exploration, a moratorium, and the possibility of recourse to the means for settlement specified in Article 33 of the Charter".[80]

38. In deciding to transpose to the draft articles the settlement of disputes clause adopted at the Vienna Conference on the Law of Treaties, the Commission acknowledged the "peculiarities of article 66",[81] which appeared in the body of the treaty, and not among its final clauses, and covered only disputes pertaining to part V of the Vienna Convention.[82] After considering various means of addressing the "major procedural difficulty"[83] entailed by the impossibility of international organizations being parties to cases before the International Court of Justice, the Commission eventually opted for a "simple"[84] solution, according to which disputes concerning draft articles 53 and 64 would be submitted to arbitration whilst for disputes concerning other provisions in part V, the system of compulsory recourse to conciliation instituted by the 1969 Vienna Convention would be retained.[85]

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[78] See United Nations, *Treaty Series*, vol. 1035, No. 15410.

[79] See para. 29 above.

[80] *Yearbook ... 1982*, vol. II (Part Two), p. 63, commentary to draft article 65, para. 2. The Commission proposed two amendments to the text of article 65 of the Vienna Convention concerning the time limit for making an objection and the submission of the notification of objection made by an international organization to the rules of that organization (*Ibid.*, pp. 63 and 64, at paras. 3-5). The latter amendment was retained in the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[81] *Ibid.*, p. 64, commentary to draft article 66, para. 2.

[82] *Ibid.*

[83] *Ibid.*, p. 65, para. 4.

[84] *Ibid.*, para. 6.

[85] *Ibid.*

39. The settlement of disputes mechanism provided for in article 66 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations[86] appears in some respects more complex than the one adopted by the Commission, particularly as far as disputes regarding the application or interpretation of articles 53 or 64 of the Convention are concerned. Depending on the character of the parties to the dispute, the International Court of Justice may indeed be called to render a decision or give an advisory opinion, unless all the parties to the dispute agree to submit it to an arbitration procedure.[87]

8. Draft articles on the law of the non-navigational uses of international watercourses, 1994

40. As emphasized by the Commission itself, draft article 33 of the draft articles on the law of the non-navigational uses of international watercourses provided "a basic rule for the settlement of watercourse disputes",[88] residual in nature and consisting in a three-step procedure: if unsuccessful, consultations and negotiations should be followed by recourse to methods of impartial fact-finding, through a fact-finding commission; mediation or conciliation; and finally arbitration or judicial settlement upon agreement of the parties concerned.[89]

41. Although the rule embodied in draft article 33 may thus appear basic in character, the question of including settlement of disputes clauses in the draft articles gave rise to an extensive debate in the Commission, particularly at the beginning of the second reading of the draft.[90] Some members doubted the value of inserting such clauses, given the diversity of watercourses and "the flexibility of the instrument being prepared"; in their view, disputes in that respect "could more effectively be resolved by political means, rather than by adjudication".[91] Conversely, other members pointed to the increasing needs of populations and the scarcity of the resource as supporting the necessity to provide for technical means of solving watercourse disputes.[92] The majority in the Commission ultimately joined the Special Rapporteur in considering that the recommendation of a "tailored set of

[86] A/CONF.129/15.

[87] See articles 65 and 66 of the Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[88] *Yearbook ... 1994*, vol. II (Part Two), p. 134, commentary to draft article 33, para. 1.

[89] Ibid., pp. 134 and 135, paras. 2-11. The Commission also provided the requirement of notification, negotiation and consultation for States wishing to implement planned measures regarding international watercourses, in order to maintain an equitable balance between the parties and avoid disputes among them regarding the uses of watercourses (ibid., pp. 111-118, draft articles 11-19).

[90] See *Yearbook ... 1993*, vol. II (Part Two), p. 86, paras. 351-357.

[91] Ibid., para. 353.

[92] Ibid., para. 352. The view was also expressed that the "elasticity of the substantive rules made it indispensable to provide for" compulsory fact-finding, conciliation, arbitration and judicial settlement (ibid., para. 357).

provisions"[93] on dispute settlement would constitute an "important contribution"[94] even if the draft articles were to take the form of model rules.[95]

42. While article 33, on the settlement of disputes, of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses[96] maintains the residual character of the draft article adopted by the Commission, it differs significantly from it. Thus, if the parties concerned cannot solve their dispute by negotiation, they may jointly seek a settlement through good offices, mediation, conciliation or the use of joint watercourse institutions or agree to submit their dispute to arbitration or to the International Court of Justice. The recourse to an impartial fact-finding commission at the request of any of the parties to the dispute is understood as an ultimate recommendatory procedure for an equitable solution of the dispute, should the other means previously listed have failed to provide for a settlement.

9. Draft articles on the prevention of transboundary harm from hazardous activities, 2001

43. As indicated by the Drafting Committee, article 19 of the draft articles on the prevention of transboundary harm from hazardous activities is a revision, "in summary form", of article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses, "which had been extensively negotiated by States and found acceptable".[97] It is "residual in nature",[98] as it applies in the absence of any other agreement by the States concerned for the settlement of their disputes; failing an agreement on the traditional means for dispute settlement to be resorted to, draft article 19 provides for a compulsory procedure for the appointment of an impartial fact-finding commission, the recommendations of which are to be considered in good faith by the parties.[99]

44. The provisions of draft article 19, as explained by the Drafting Committee, were intended to strike a fair balance between different imperatives. On the one hand, and in contrast to the provision on settlement of disputes adopted on first reading,[100] it was felt necessary to refrain from including in the draft a mere "'disabled' dispute settlement mechanism",[101] i.e. a mechanism requiring the full cooperation of all the parties for the setting up of a fact-finding commission. On the other hand, it was considered prudent "not to establish fully-fledged dispute settlement provisions which might serve as a disincentive to ratification by Governments".[102]

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[93] Ibid., para. 351.

[94] Ibid.

[95] The resolution on confined transboundary groundwater adopted by the Commission upon completion of the second reading of the draft contains an explicit recommendation to the effect that States consider resolving disputes involving transboundary confined groundwaters in accordance with the provisions contained in article 33 of the draft articles (see *Yearbook ... 1994*, vol. II (Part Two), p. 135).

[96] See General Assembly resolution 51/229, annex.

[97] *Yearbook ... 2001*, vol. I, p. 63, para. 28.

[98] *Yearbook ... 2001*, vol. II (Part Two), p. 170, commentary to draft article 19, para. 1.

[99] Ibid., pp. 169 and 170, draft article 19.

[100] See *Yearbook ... 1998*, vol. II (Part Two), p. 41, draft article 17.

[101] *Yearbook ... 2001*, vol. I, p. 63, para. 27.

[102] Ibid., para. 28.

B. Settlement of disputes clauses discussed but not eventually included in the drafts adopted by the Commission

45. A brief overview of the drafting history of the articles adopted by the Commission since its first session shows that, in almost half the cases, the necessity and opportunity to insert settlement of disputes clauses did not arise as a matter for discussion.[103] This section examines the draft articles in the context of which the possibility of including such clauses, while substantially discussed, has not been finally retained. While the list presented hereafter is not intended to be exhaustive, it aims to further illustrate the manner in which the Commission has addressed issues relating to settlement of disputes clauses in its history.

1. Draft articles on succession of States in respect of treaties, 1974

46. In the course of the concluding debates on the first reading of the draft articles on succession of States in respect of treaties, in 1972, some members of the Commission stressed the importance of examining in due course the question of the possible need for provisions concerning the settlement of disputes arising out of the interpretation and application of the draft. The Commission, however, considered it premature to take up the question at that stage.[104]

47. The issue was to arise again in the course of the second reading of the draft articles, on the basis of comments made by some Governments foreseeing difficulties in the application of the articles and, hence, the need for some settlement of disputes procedure.[105] Given the conceptual relationship existing between the draft articles on succession of States in respect of treaties and the Vienna Convention on the Law of Treaties, some members of the Commission supported the inclusion in the former of procedures for settlement of disputes based on the provisions of the latter.[106] Ultimately, the view prevailed that "the Commission should not pursue the matter further without reference to the General Assembly",[107] on the understanding that the question could be given further consideration if the Assembly so wished in preparation for a convention.[108]

48. The 1978 Vienna Convention on Succession of States in Respect of Treaties contains a Part VI entirely devoted to the settlement of disputes, which refers in turn to consultation and negotiation, conciliation (under a procedure designated in an annex to the Convention), judicial settlement and arbitration upon individual declarations of acceptance by the parties or by common consent.[109]

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[103] Obviously, the absence of debate on the issue in the Commission does not prevent the eventual adoption of settlement of disputes mechanisms in instruments which, like the 1963 Vienna Convention on Consular Relations or the 1969 Convention on Special Missions (both of which are accompanied by an optional protocol on the compulsory settlement of disputes), have been concluded on the basis of draft articles adopted by the Commission.

[104] See *Yearbook ... 1972*, vol. II, p. 229, para. 50.

[105] See *Yearbook ... 1974*, vol. II (Part One), p. 173, para. 79.

[106] Ibid., para. 80.

[107] Ibid.

[108] Ibid., para. 81.

[109] United Nations, *Treaty Series*, vol. 1946, No. 33356, articles 41–45.

2. Draft articles on the most-favoured-nation clause, 1978

49. The question of settlement of disputes arose during both the first and the second readings of the draft articles on the most-favoured-nation clause. Some members supported the inclusion of a specific clause in that respect, which would specify the right of a party to refer a dispute for judicial settlement failing resolution by other means.[110] The Commission eventually refrained, however, from formulating any provision on settlement of disputes, on the understanding that the question "should be referred to the General Assembly and Member States and, ultimately, to the body that might be entrusted with the task of finalizing the draft articles".[111]

3. Draft articles on succession of States in respect of State property, archives and debts, 1981

50. At an early stage of the study of succession of States in respect of matters other than treaties, a diversity of views was expressed in the Commission as to the need to address the question of settlement of disputes. For some members, the Commission should "attempt to work out an adequate system"[112] of judicial settlement of disputes arising out of State succession; for others, the question "went beyond the scope of the topic and should be excluded from the Commission's work".[113] The prevailing opinion was that, pending more progress in studying the substance of the topic, any decision on the issue of dispute settlement would be premature.[114] During the subsequent sessions, however, the Commission never held a debate on the need to design a settlement of disputes procedure specific to the succession of States in respect of State property, archives and debts, even though the intention of taking up the issue at a later stage was reiterated on several occasions.[115] The Commission did not, in particular, consider the possibility of transposing to the draft articles, which it regarded as a complement to the 1978 Vienna Convention,[116] the system adopted during the United Nations Conference on Succession of States in Respect of Treaties.

51. The Vienna Convention on Succession of States in Respect of Property, Archives and Debts of 8 April 1983 provides, in Part V, a settlement of disputes regime[117] substantially identical to the mechanism embodied in Part VI of the Vienna Convention on Succession of States in Respect of Treaties.[118]

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[110] See *Yearbook ... 1976*, vol. II (Part Two), p. 10, para. 55, and *Yearbook ... 1978*, vol. II (Part Two), p. 15, para. 68.

[111] *Yearbook ... 1978*, vol. II (Part Two), p. 15, para. 69 and, for similar language on first reading, *Yearbook ... 1976*, vol. II (Part Two), p. 10, para. 55.

[112] *Yearbook ... 1968*, vol. II, p. 220, para. 71.

[113] Ibid.

[114] Ibid., para. 72. The Commission indicated that it was not possible at that early stage of the study "to determine the type of dispute which might arise from the rules proposed, and the procedures or methods of settlement best suited to those aspects concerning which it might be considered advisable to work out a system of settlement".

[115] See *Yearbook ... 1976*, vol. II (Part Two), p. 126, para. 103; *Yearbook ... 1977*, vol. II (Part Two), p. 56, para. 58; *Yearbook ... 1978*, vol. II (Part Two), p. 110, para. 122.

[116] See *Yearbook ... 1981*, vol. II (Part Two), p. 16, para. 63.

[117] See *Official Records of the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts*, vol. II, articles 42–46.

[118] See para. 48 above.

4. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and draft optional protocols, 1989

82. The question of the settlement of disputes in connection with the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was only addressed at the beginning of the second reading of the draft, and mainly because a few Governments had suggested including provisions "of a flexible nature" on the issue.[119] The suggestion met with support in the Commission.[120] Some members indicated that the most appropriate form for including settlement of disputes clauses would be that of an optional protocol annexed to the instrument to be adopted, as had been done in the 1961 Vienna Convention on Diplomatic Relations,[121] the 1963 Vienna Convention on Consular Relations and the 1969 Convention and Special Missions. The Special Rapporteur, while recognizing the merits of that approach, also mentioned as an alternative course the one taken in the 1975 Vienna Convention on Representation of States in their Relations with International Organizations of a Universal Character, which provides for the settlement of disputes through consultations and conciliation.[122]

83. At the end of the second reading of the draft articles, the Commission recommended to the General Assembly that an international conference of plenipotentiaries be convened to conclude a convention on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.[123] It decided to leave it to the conference "to resolve the usual problems relating to the final clauses of the convention and to the peaceful settlement of disputes".[124]

5. Draft articles on jurisdictional immunities of States and their property, 1991

84. At the forty-eighth session of the Commission, in 1986, the Special Rapporteur on jurisdictional immunities of States and their property proposed a number of amendments to the articles previously adopted on first reading, as well as a number of new draft articles, including provisions for the settlement of disputes, stating that the insertion of a procedure for the settlement of disputes was "increasingly fashionable"[125] in recent works of codification. The Special Rapporteur presented two options for the topic under consideration. On the one hand, the dispute of settlement clauses could cover disputes concerning the application and interpretation of the articles in general, or be confined to specific aspects of the topic, whether or not on the basis of reciprocity.[126] On the other hand, the need for a dispute settlement clause might depend on the substance of the draft articles. In the specific context of the topic, he noted that there could only be a dispute if a court decided to exercise jurisdiction in proceedings involving another State. Where such jurisdiction had been exercised, only rarely had the State which

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[119] ... (1988, vol. II (Part Two), p. 97, para. 489).

[120] ... (1988, vol. II (Part Two), p. 97, para. 492. On the settlement of disputes clauses ... Vienna Convention on Representation of States in their Relations with ... Organizations of a Universal Character, see para. 32 above.

[121] ... (1989, vol. II (Part Two), p. 13, para. 66).

[122] ... (1986, vol. II (Part One), p. 33, para. 45).

had been refused jurisdictional immunity taken any measure or step other than the mere presentation of a protest. In the light of that practice, the Special Rapporteur suggested that the Commission might not find it absolutely necessary to include dispute settlement provisions in the draft articles, and stated that he himself would not propose the inclusion of such provisions. Nevertheless, he added that one might wish to guard against the emergence of a new trend which could entail not only the use of jurisdiction in proceedings involving the interest of another State, but also the exercise of enforcement measures against its property. In order to discourage vexatious litigation, there might be a growing need to devote a part of the draft to the settlement of disputes, which might have the effect of discouraging courts from allowing provisional or enforcement measures against State property. The Special Rapporteur suggested that, should the Commission find it expedient to include such provisions in the draft articles, the regime established under the Vienna Convention on Succession of States in Respect of Treaties[127] might provide an appropriate precedent in that regard.[128]

55. In his preliminary report presented to the Commission at its fortieth session, the new Special Rapporteur noted that the Commission had not given thorough consideration to the question of a settlement of disputes mechanism due to lack of time.[129] During the discussion at the forty-first session of the Commission, one member expressed the view that it might not be appropriate to include rules on the settlement of disputes in the draft articles. He suggested that, should the draft articles take the form of a future convention, the legal mechanism for dispute settlement would most appropriately be incorporated in an optional protocol to the convention. Several members favoured leaving the question to be determined by a diplomatic conference.[130] It was also pointed out that an indication of the preference of the General Assembly would be useful before the Commission addressed the matter further.[131]

56. The convention adopted by the General Assembly on 2 December 2004[132] contains a settlement of disputes regime based on the proposal made by the chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property.[133] It provides that State parties should try to settle their disputes through negotiation. If a dispute concerning the interpretation or application of the Convention cannot be settled within reasonable time, it shall, at the request of either party, be submitted for arbitration. If the parties cannot agree upon the organization of the arbitration within six months of such a request, the dispute may be referred to the International Court of Justice by either party, in accordance with the Statute of the Court.[134] The dispute settlement procedure is, however, subject to reservation by State parties.[135]

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[127] United Nations, *Treaty Series*, vol. 1946, No. 33356. See para. 48 above.

[128] *Yearbook ... 1986*, vol. II (Part One), p. 33, paras. 46 and 47.

[129] A/CN.4/415, para. 274.

[130] *Yearbook ... 1991*, vol. II (Part Two), p. 13, para. 26.

[131] Ibid.

[132] United Nations Convention on Jurisdictional Immunities of States and Their Property (General Assembly resolution 59/38, annex).

[133] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 22* (A/59/22), annex II, sect. A.

[134] United Nations Convention on Jurisdictional Immunities of States and Their Property, article 27 (1) and (2).

[135] Ibid., article 27 (3).

6. Draft articles on the responsibility of States for internationally wrongful acts, 2001

In the lengthy drafting history of the draft articles on the responsibility of States for internationally wrongful acts, the Commission discussed both the general question of whether to include a dispute settlement mechanism for the entire set of draft articles and the specific issue of whether there was a connection to be made between such a mechanism (or other available dispute settlement procedures) and recourse to countermeasures.

With regard to the first question, it should be noted that, while the draft articles adopted on first reading in 1996 included a set of seven articles, as well as provisions on settlement of disputes, the final draft adopted on second reading in 2001 contained no across-the-board provision concerning the settlement of disputes regarding the interpretation or application of the draft articles.

The possibility of including in the draft articles general provisions relating to the settlement of disputes was discussed by the Commission from the earliest years of its work on this topic. At the fifteenth session, in 1963, two members of the subcommittee established by the Commission to consider general aspects of the topic had submitted memorandums in which they emphasized the importance of compulsory dispute settlement procedures.[136] However, the initial programme of work on the topic proposed by the subcommittee and endorsed by the Commission did not envisage a part relating to dispute settlement.[137] At its twenty-first session, in 1969, the Commission reviewed its plan of work and decided to consider at a later stage the possibility of examining certain problems concerning the implementation of the international responsibility of States and questions relating to the settlement of disputes.[138]

When the question was discussed on first reading,[139] some members called for the elaboration of dispute settlement provisions.[140] It was pointed out that, in the light of the reluctance of States to accept third-party dispute settlement

... 1963, vol. II, pp. 247-250 (Mr. Tsuruoka) and pp. 244-246 (Mr. Paredes).

... annex I.

... 1993, vol. II, p. 125, document A/7610/Rev.1, paras. 80-82. The Commission's ... the possibility of a third stage relating to dispute settlement, met with general ... Committee of the General Assembly during its consideration of the ... annual report (*Official Records of the General Assembly, Twenty-fourth Session, ... agenda items 86 and 94 (b)*, document A/7746, paras. 86-89).

... part three concerning the settlement of disputes was first considered by the ... at its thirty-seventh and thirty-eighth sessions in 1985 and 1986, on the basis of ... fifth and seventh reports (respectively, *Yearbook ... 1985*, vol. II (Part One), ... A/CN.4/389 and *Yearbook ... 1986*, vol. II (Part One), p. 1, document ... and Add.1). A set of draft articles and the related annex were then referred to the ... Drafting Committee. The issue continued to be considered at the forty-fifth session of the ... 1993, this time on the basis of Mr. Arangio-Ruiz's fifth report (*Yearbook ...* ... (Part One), document A/CN.4/453 and Add.1-3), when the corresponding ... were again referred to the Drafting Committee (*Yearbook ... 1993*, vol. II (Part Two), ... and 206). The relevant articles, with commentaries, were adopted by the ... reading at its forty-seventh session in 1995 (*Yearbook ... 1995*, vol. II (Part ... para. 364 for the articles and commentaries, see pp. 75-83).

... 1993, vol. II (Part Two), p. 24, paras. 159-161. See also *Yearbook ... 1993*, vol. II ... para. 224.

procedures, it was still premature for the Commission to embark in that direction[141] and that the Commission should be careful not to make proposals that States would not accept.[142] Doubts were also expressed as to the possibility of devising a single regime for all types of responsibility disputes, and of distinguishing between the general question of responsibility and the problem of the primary rules the violation of which gave rise to such responsibility.[143] The majority of the Commission, however, supported the inclusion of a dispute settlement mechanism, which was generally considered necessary for the implementation of the draft articles.[144] It was emphasized, in that regard, that States had displayed increased willingness to accept dispute settlement procedures in recent times.[145]

61. The overall issue of dispute resolution was again considered by the Commission at the end of the second reading.[146] Some members favoured including dispute settlement provisions in the draft articles, particularly if the Commission were to recommend the elaboration of a convention, because of the significance and complexity of the topic and to enhance the capacity of courts and tribunals to develop the law through their decisions.[147] Some other members, however, considered it unnecessary to include such provisions, noting that it could cause an overlap with existing dispute settlement mechanisms, thus leading to their fragmentation and proliferation.[148] The proposal was also made to draft a general dispute settlement provision similar to Article 33 of the Charter.[149] The Commission decided that it would not include provisions for a dispute settlement machinery, but would draw attention to the machinery elaborated on first reading as a possible means for settlement of disputes concerning State responsibility, leaving it to the General Assembly to consider whether, and in what form, provisions for dispute settlement could be included in the event that the Assembly should decide to elaborate a convention.[150]

62. The Commission also considered the question of clauses relating to the settlement of disputes with specific reference to the issue of resort to countermeasures. In order to remedy the possible drawbacks of unilateral countermeasures, it was initially proposed that the relevant regime be supplemented

[141] *Yearbook ... 1985*, vol. II (Part Two), p. 24, para. 160; *Yearbook ... 1993*, vol. II (Part Two), p. 37, para. 221.

[142] *Yearbook ... 1993*, vol. II (Part Two), p. 37, para. 223 and p. 38, para. 225.

[143] Ibid., p. 39, paras. 230-231.

[144] *Yearbook ... 1985*, vol. II (Part Two), p. 24, paras. 159-161. See also *Yearbook ... 1993*, vol. II (Part Two), p. 37, para. 221.

[145] *Yearbook ... 1993*, vol. II (Part Two), p. 37, para. 222.

[146] In his first report, the new Special Rapporteur, Mr. Crawford, had noted that the Commission's decision on this issue would depend to a great extent upon the eventual form of the draft articles, which he suggested should be dealt at a later stage (document A/CN.4/490, paras. 33, 38 and 42). The Special Rapporteur also pointed to the fact that "[a]ny compulsory system of dispute settlement under the draft articles potentially becomes a general dispute settlement for inter-State disputes" (ibid., para. 33).

[147] *Yearbook ... 2001*, vol. II (Part Two), p. 23, para. 57.

[148] Ibid., para. 58.

[149] Ibid., para. 59.

[150] Ibid., para. 60. In its recommendation to the General Assembly, the Commission specified that it "was of the view that the question of the settlement of disputes could be dealt with by the [...] international conference [of plenipotentiaries], if it considered that a legal mechanism on the settlement of disputes should be provided in connection with the draft articles" (*Yearbook ... 2001*, vol. I, p. 305, para. 71 (2709th meeting)).

by a three-step third-party dispute settlement mechanism (conciliation, arbitration and judicial settlement).[151] While that approach was questioned by some members, it was favoured by others, who pointed out that such a mechanism would protect States from abuses of the right to resort to unilateral measures.[152] On first reading, the Commission decided to include a provision on the conditions for resort to countermeasures, whereby an injured State taking such measures was notably under the prior duty to negotiate and to comply with the obligations in relation to dispute settlement arising under part three of the draft articles or any other binding dispute settlement procedure in force with the wrongdoing State. On second reading, however, that text was criticized as being unfounded in international law and as unduly cumbersome and restrictive.[153] A simplified provision was thus adopted in the final draft articles in 2001.[154]

7. Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, 2006

63. During the fifty-sixth session of the Commission, in 2004, the Special Rapporteur in his second report proposed a set of draft principles, including a clause on settlement of disputes which provided a regime including arbitration or submission to the International Court of Justice on the basis of mutual agreement.[155] The text adopted by the Commission on first reading at the same session, however, did not include such a clause on the understanding that the final form of the instrument would be reconsidered in the light of the comments and observations received from Governments.[156] The question of the settlement of disputes clause would be revisited should the Commission have to prepare a draft framework convention in the future.[157]

8. Draft articles on the law of transboundary aquifers, 2008

64. The need for a settlement of disputes regime in connection with the law of transboundary aquifers was mentioned during the debate at the fifty-fifth session of the Commission on the basis of the first report of the Special Rapporteur, in which reference was made to the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, which includes compulsory reference to an impartial fact-finding commission.[158] The Special Rapporteur had also recalled that the question of whether a compulsory fact-finding regime was practical was solved by allowing States to make reservations.[159]

[151] See the proposal by Special Rapporteur Arangio-Ruiz, as described in *Yearbook ... 1993*, vol. II (Part Two), p. 36, para. 234.

[152] Ibid., p. 38, para. 228.

[153] Fourth report on State responsibility by Mr. James Crawford, Special Rapporteur, document A/CN.4/517, para. 67.

[154] See draft article 52 and commentary thereto, *Yearbook ... 2001*, vol. II (Part Two), pp. 135-137.

[155] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), note 342.

[156] Ibid., p. 197.

[157] Ibid.

[158] Ibid., *Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 266, para. 405. On the settlement of disputes clauses of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, see para. 42, above.

[159] A/CN.4/533, paras. 10 and 11.

65. The articles proposed by the Special Rapporteur at the fifty-seventh session of the Commission did not include any general clause concerning settlement of disputes, but an option to establish a fact-finding body to assess the effect of planned activities was provided in draft article 17, paragraph 2.[160] Some members stressed the need for separate provisions on settlement of disputes.[161] The Special Rapporteur, however, questioned that necessity as transboundary aquifers, unlike watercourses, did not have a long history of international cooperation and the settlement of disputes regime adopted in the Watercourses Convention had partially been reflected in the current draft articles.[162]

66. On second reading of the draft articles, at the sixtieth session, the Commission recommended that the General Assembly adopt a two-step approach, namely, that it first take note of the draft articles and then consider the elaboration of a convention based on the draft. In so doing, the Commission decided to leave the issue of the inclusion of dispute settlement articles aside, as they would only be necessary if and when the second step were to be initiated.[163]

IV. Recent practice of the General Assembly in relation to settlement of disputes clauses

67. Pursuant to the request by the Commission that the Secretariat prepare a note on the history and past practice of the Commission in relation to settlement of disputes clauses, "taking into account recent practice of the General Assembly", the present section focuses on conventions which were not formulated and adopted on the basis of draft articles elaborated by the Commission. During the last 15 years, the General Assembly has adopted six conventions and three protocols which were not based on a draft prepared by the Commission, and which contain provisions relating to the settlement of disputes between the parties. These instruments all provide for the same mechanism for the settlement of disputes between their respective parties.

68. The three conventions relating to the suppression of terrorism — the 1997 International Convention for the Suppression of Terrorist Bombings,[164] the 1999 International Convention for the Suppression of the Financing of Terrorism[165] and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism[166] — were drafted by the ad hoc committee on measures to eliminate terrorism.[167] The clauses pertaining to the peaceful settlement of disputes in these Conventions provide that States parties shall endeavour to settle disputes concerning the application or interpretation of the Convention by negotiation. A dispute which cannot be settled by negotiation within a reasonable time shall, at the request of either party, be submitted to arbitration. If, within six months from the date of the

[160] A/CN.4/551, para. 36.
[161] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 40, para. 60.
[162] Ibid., p. 43, para. 106.
[163] Ibid., *Sixty-third Session, Supplement No. 10* (A/63/10), pp. 28 and 29, para. 54.
[164] United Nations, *Treaty Series*, vol. 2149, No. 37517. See article 20.
[165] Ibid., vol. 2178, No. 38349. See article 24.
[166] General Assembly resolution 59/290, annex. See article 23.
[167] Established pursuant to General Assembly resolution 51/210 of 17 December 1996.

request, the parties are unable to agree on the organization of the arbitration, any party may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court. A State party may at the time of signature, ratification, acceptance or approval of the Convention, make a reservation with regard to the settlement of disputes procedure.

69. The same procedures for the settlement of disputes were included in the 2000 United Nations Convention against Transnational Crime,[168] including its three protocols (the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air,[169] the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[170] and the 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition[171]); the 2003 United Nations Convention against Corruption;[172] and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.[173]

[168] United Nations, *Treaty Series*, vol. 2225, No. 39574.
[169] Ibid., vol. 2241, No. 39574. See article 20.
[170] Ibid., vol. 2237, No. 39574. See article 20.
[171] Ibid., vol. 2326, No. 39574. See article 16.
[172] Ibid., vol. 2349, No. 42146. See article 66.
[173] General Assembly resolution 61/177, annex. See article 42.